

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR -3 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2012-0016-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| ROBERT C. ECHOLS, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200701774

Honorable Robert C. Brown, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Robert C. Echols

Buckeye
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 Following a jury trial, petitioner Robert Echols was convicted of two counts of discharging a firearm at a residential structure and ten counts of aggravated assault, all arising from a drive-by shooting. The trial court sentenced Echols to a combination of mitigated and presumptive, consecutive and concurrent prison terms totaling sixty-eight

years. We affirmed Echols's convictions and sentences on appeal. *State v. Echols*, No. 2 CA-CR 2008-0271 (memorandum decision filed July 8, 2009).

¶2 After Echols's attorney filed a notice citing *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995), stating she could find "no colorable claims" to raise in a petition for post-conviction relief, Echols filed a supplemental, pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court denied relief on all of Echols's claims except one—a claim of ineffective assistance of trial counsel related to *Batson v. Kentucky*, 476 U.S. 79 (1986)—on which the court conducted an evidentiary hearing and then denied relief. Echols now challenges the court's denial of his petition and his motion for rehearing. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶3 In response to Echols's complaint that the only prospective African-Americans had been removed unlawfully from the jury panel, raising a potential claim under *Batson*, the trial court conducted an evidentiary hearing on the "sole question of whether or not [Echols's] trial counsel was ineffective for failing to make a challenge to the State's exercise of their preemptive challenges." In addition to the other issues Echols raises on review, which we discuss below, he presents three claims challenging the court's conduct at the evidentiary hearing. First, he contends the court abused its discretion by denying his "request for appointment of counsel" at the hearing. Although appointed counsel assisted him in an advisory role at the hearing, Echols nonetheless claims the court should have granted his request to appoint a different attorney to

represent him based on his belief advisory counsel was not looking out for his best interests and because she did not “correspond[.]” with him. After reminding Echols that advisory counsel was “competent to advise [him] as to anything [he] need[ed],” the court denied his request for a new attorney. Based on the record before us, we find no abuse of discretion in the court’s ruling. *See State v. LaGrand*, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987) (dissatisfaction with counsel insufficient ground for substitution).

¶4 Second, Echols argues the trial court erred by denying his request for “full disclosure of the transcripts and records of [the] jury selection proceedings.” However, in May 2011, well before the September 2011 evidentiary hearing, the court ordered the preparation of the transcript of the June 24, 2008 voir dire examination and ordered that a copy of the transcript be furnished to Echols. And, that transcript is part of the record on review. Moreover, it is unclear what additional “records of [the] jury selection proceedings” Echols claims the court should have provided him.¹ In any event, after explaining that prospective jurors are not required to provide their race on the juror questionnaire, the court noted that, having examined “all the court records, . . . there are no racial indications, whatsoever, as to the jury panel.”

¶5 The trial court then permitted Echols to question his former attorney, Thomas Larson, to establish whether any African-Americans had been excluded improperly from the jury panel. Larson testified that he could recall only one prospective African-American juror, and that he had moved to strike that person, who was an

¹Echols asked the court to provide him with the “masters” of the voir dire examination at the evidentiary hearing.

acquaintance and friend of the prosecutor. Larson added that he would have used his peremptory strike to remove that person even if he were “an alien from Mars” because of the person’s relationship with the prosecutor. We thus find no basis for Echols’s claim that he was denied access to the necessary transcripts and records to support his assertion that trial counsel was ineffective for failing to challenge the removal of prospective jurors based solely on race.

¶6 Third, Echols asserts the trial court improperly denied his request to continue the evidentiary hearing. At the hearing, Echols told the court that, because he had not been notified the court intended to address only the *Batson* issue, he had prepared instead to address “all of it,” and he thus needed more time to prepare his argument. The court denied his request, explaining “[i]f you prepared for the hearing on all the issues [raised in the Rule 32 petition], then you should be prepared on this one.” The court then permitted Echols to confer with advisory counsel before the hearing continued. We generally review the grant or denial of a motion to continue for an abuse of discretion. *See State v. Sullivan*, 130 Ariz. 213, 215, 635 P.2d 501, 503 (1981). Based on the record before us, and in the absence of any claim that Echols actually was prejudiced by the court’s denial of his request to continue the evidentiary hearing, we find no abuse of discretion.

¶7 Echols next maintains there was insufficient evidence to support the “primary” charge of discharging a firearm at an occupied structure, asserting he was entitled to an evidentiary hearing on this claim. However, because Echols could have

raised this claim on appeal, he is precluded from doing so in a Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(a).

¶8 Echols also asserts he was entitled to an evidentiary hearing on the numerous claims of ineffective assistance of trial counsel he had raised below. In order to state a claim of ineffective assistance of counsel, a defendant must establish that counsel’s performance fell below an objectively reasonable professional standard and that the defendant suffered prejudice from this deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). To demonstrate the requisite prejudice, the defendant must show there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A Rule 32 petitioner “is entitled to an evidentiary hearing only when he presents a colorable claim—one that, if the allegations are true, might have changed the outcome.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). The decision whether a claim is colorable and warrants an evidentiary hearing “is, to some extent, a discretionary decision for the trial court.” *State v. D’Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶9 Based on the record before us, we cannot say the trial court abused its discretion in summarily denying Echols’s numerous claims of ineffective assistance of trial counsel. The court did so in a detailed and thorough minute entry order that clearly identified Echols’s arguments and correctly ruled on them in a manner that will allow any future court to understand their resolution. *See State v. Whipple*, 177 Ariz. 272, 274, 866

P.2d 1358, 1360 (App. 1993). We therefore approve and adopt that portion of the court’s ruling addressing the claims of ineffective assistance of trial counsel. *See id.*

¶10 Finally, to the extent Echols challenges the trial court’s failure to review the issues he raised in a document entitled “Affidavit ‘Supplement’ of Rule 32 Petition,” we decline to address that argument. In that document, which Echols filed after the court had denied relief on his petition for post-conviction relief, and on the same day it denied his motion for rehearing, Echols raised for the first time issues he characterized as newly discovered. Because Echols did not raise these claims in his petition below, the court understandably did not rule on them. Therefore, they are not before us on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶11 Because the trial court did not abuse its discretion by denying post-conviction relief, we grant the petition for review, but deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge